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MICHAEL RODAK, JR.,

Supreme Court of the United States

No. 74-226

October Term, 1974

MICHAEL KENSINGER,
Appellant,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its dismissal of appeal, entered on December 16, 1974, and (2) noting probable jurisdiction, or issuing a writ of *certiorari* in the event the Court declines to note probable jurisdiction of the appeal. As grounds for this motion, petitioner states the following:

1. The Order of the Supreme Court of December 16, 1974, Dismissed the Instant Appeal.

On December 16, 1974, this Court, four justices dissenting, dismissed the appeal of petitioner for want of a substantial federal question. The instant appeal is based upon the invalidity of Ohio's obscenity law under which

petitioner was tried and convicted. Petitioner also urges in the instant appeal that other denials of his constitutional rights compel this Court's issuance of a writ of *certiorari*.

Simultaneously with its order dismissing the appeal, the Court vacated the previous order of Justice Stewart staying the execution and enforcement of the judgments of the Supreme Court of Ohio and of the sentence of petitioner. 43 U.S.L.W. 3348 (December 17, 1974). Petitioner was sentenced to two years probation and a total fine of $500.00.

The dismissal of the appeal constitutes an affirmance on the merits of the state court decisions upholding the validity of the statutes involved; but the dismissal does not constitute a decision on the merits of the other issues presented. See *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).

Justices Brennan, Stewart, Marshall and Douglas dissented from the dismissal of the appeal, and stated that they would note probable jurisdiction and would reverse the state court decisions. Justices Brennan, Stewart and Marshall specifically noted that they did not consider whether the other questions presented in addition to petitioner's challenge to the overbreadth of Ohio's obscenity laws merit plenary review.

Petitioner urges this Court to grant rehearing of its dismissal of the appeal and to order plenary consideration of (A) the substantial federal questions presented on appeal challenging the validity of Ohio's obscenity law, and (B) the substantial federal questions presented as on petition for writ of *certiorari* challenging other denials of well-established constitutional rights.

2. The Questions Presented on Appeal Warrant Plenary Consideration.

A petition for rehearing of decisions, other than those denying or granting *certiorari*, will be granted only at the instance of a justice who concurred in such decision, and upon the concurrence of a majority of the Court. Rules of the Supreme Court of the United States, Rule 58(1); *Reid v. Covert*, 354 U.S. 1, 65-67 (1957) (Harlan, J., concurring).

By the margin of a single vote and in the absence of plenary consideration, this Court has upheld in the instant cause the validity of Ohio's statutory attempt to suppress sexually oriented materials on the basis of their alleged obscene contents. Thus the Court has rejected petitioner's urgings that as a result of such affirmance, persons of Ohio are subject to conviction, fine and imprisonment for the distribution of material constitutionally protected under the pronouncements of this Court. For, Ohio's obscenity law, on its face and as construed by the Supreme Court of Ohio, fails to require that the material be patently offensive, fails to require proof that the material lack the requisite value, and fails to accurately require that the material, *taken as a whole*, appeal to a prurient interest. Jurisdictional Statement, p. 7.

Petitioner submits that the difficult issues presented, and which have sharply divided this Court, warrant plenary consideration with the fullest opportunity for each justice to evaluate the arguments and to formulate his views. Plenary consideration is especially compelling since similar challenges to the validity of Ohio's obscenity law are currently before this Court in *State ex rel. Sensenbrenner v. Adult Bookstore*, 35 Ohio St. 2d 220 (1973), *petition for cert. filed*, 42 U.S.L.W. 3388 (U.S. Dec. 24, 1973) (No. 73-982), and *Art Theater Guild, Inc. v. State of Ohio*

ex rel., Clark L. Ewing, 37 Ohio St. 2d 95 (1974), *appeal filed*, 43 U.S.L.W. 3125 3125 (U.S. Sept. 10, 1974) (No 73-1973).

Petitioner urges each justice to reconsider the issues presented and to vote for rehearing and the noting of probable jurisdiction.

3. The Questions Presented as on Petition for Writ of Certiorari Warrant Plenary Consideration.

A petition for rehearing of orders on petition for writ of *certiorari* will be granted if the petition presents intervening circumstances, of substantial or controlling effect. Rules of the Supreme Court of the United States, Rule 58 (2).

The other issues presented by petitioner in addition to his challenge to the validity of Ohio's obscenity law are properly before and reviewable by this Court. See *Flournoy v. Weiner*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922).

However, Justices Brennan, Stewart and Marshall specifically noted their failure to consider the other issues presented (Brennan, J., dissenting). And it appears that Justice Douglas also did not consider such issues (Douglas, J., dissenting). Furthermore, the order dismissing the appeal does not disclose how the justices who joined in the order for dismissal voted on the granting of review based upon such issues.

In support of their failure to consider the other issues presented, Justices Brennan, Stewart and Marshall relied upon Justice Brennan's dissent in *Heller v. New York*, 413 U.S. 495 (1974). But the decision of these three Justices to consider only the validity of the state obscenity law in *Heller* is inapplicable to the instant case. For in *Heller*, a

majority of the Court, upon plenary consideration of the issues unrelated to the validity of New York's obscenity law, decided the case adversely to petitioner's contentions. Thus, the decision of the Court in *Heller* could not have been altered by the positions of Justices Brennan, Stewart and Marshall on different grounds, and their failure to consider these issues had no effect upon the outcome.

However, in the instant case, consideration by the three Justices of issues not previously considered by them *could* easily affect the Court's issuance of a writ of *certiorari*. For the Court may grant review upon the affirmative vote of a substantive minority of the justices. *See Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15, n.2 (1959) (Douglas, J., concurring); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957) (Harlan, J., concurring). And as above noted, under the current order of the Court, at least four justices have not voted on whether to grant a writ of *certiorari* in the instant case.

Thus, petitioners submit that the question of whether the other issues presented warrant plenary consideration remains undecided and compels rehearing. *Cf. Silver King Coalition Mines Company v. Conkling Mining Company*, 256 U.S. 18, 25 (1921).

The failure of each justice to vote on each issue is an adjudicatory procedure as disturbing in its implications as the substantial constitutional issues herein presented. For, each justice, unless he disqualifies himself in a particular case, is to pass upon every piece of business coming to the Court. Mr. Justice Brennan: *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 400-406 (1960); U.S. Const. Art. III, §1. Furthermore, the failure of the entire Court to consider all the issues is a practice which renders unworkable the Court's rule of granting review upon the affirmative vote of a substantial minority of the justices.

Petitioner urges that the Court, upon rehearing, grant plenary review. For, if the state court decisions stand as the law of Ohio, the people of Ohio will be denied well established constitutional rights in the following areas of the law:

The Law of Search and Seizure. Law enforcement officers can halt the orderly distribution of materials and avoid the necessity of a prior judicial determination of their obscenity: (1) The officers can *seize the person* involved in such distribution rather than the material; and (2) The officers can use governmental dollars to "make buys" of material in furtherance of a planned governmental effort to support criminal prosecutions.

If the Court does not grant review, the State of Ohio will be able to do in substance what this Court stated a government could not do: halt the distribution of material without a judicial determination of the obscenity of the material. If the Court now intends to limit its holding in *Roaden v. Kentucky*, 413 U.S. 496 (1973), it should do so only upon plenary consideration.

Pre-Trial procedures of identification of the accused. A witness to alleged criminal conduct who is also a policeman, can make at a time subsequent to an accused's indictment, a pre-trial, out-of-court identification of the accused in the absence of his counsel and under unnecessarily suggestive circumstances conducive to mistaken identification. If the Court does not grant review, law enforcement officers will be above the law as to constitutional requirements of pre-trial, out-of-court identification procedures. If the Court now intends to limit its holdings in *Kirby v. Illinois*, 406 U.S. 682 (1972) or *Neil v. Biggers*, 409 U.S. 188 (1972) it should do so only upon plenary consideration.

Proof of scienter as an element of the crime charged. Convictions will be obtained, as in the instant case, without proof that the defendant had knowledge of the character and content of the materials at issue, or had any illegal intent as to the use of such materials. If the Court now intends to overrule its holding in *Smith v. California*, 361 U.S. 147 (1959), it should do so only upon plenary consideration.

Jury instructions in obscenity cases. The trier of fact will judge the presence of obscenity based upon what is fit for a child to read. If the Court now intends to limit its decision in *Butler v. Michigan*, 352 U.S. 380 (1957), it should do so only upon plenary consideration of the issue.

This Court should not summarily dismiss the foregoing claims of substantial denials of constitutional rights. Petitioner urges this Court to continue its invariable practice of long duration and to grant plenary review of the foregoing issues upon the affirmative vote of four or more justices. *See Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15 (1959) (Douglas, J., concurring); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959).

The "rule of four" is a safeguard, self-imposed by the Court, to prevent unduly limiting access to the Court; if a substantial minority of the justices determine that a case presents questions that are review-worthy, the case warrants plenary consideration. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957) (Harlan, J., concurring); *Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15, n.3 (1959) (Douglas, J., concurring).

CONCLUSION

For the reasons set forth above and in his jurisdictional statement, petitioner urges this Court to grant rehearing and, upon such rehearing, to note probable jurisdiction, or to issue a writ of *certiorari* in the event the Court declines to note probable jurisdiction of the appeal.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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